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Water for Wilderness

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WATER FOR WILDERNESS

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I. IMAGINE WILDERNESS

Close your eyes and envision wilderness. If you are fortunate enough to be able to do so, picture your favorite wilderness. (Mine is the Oh Be Joyful in Colorado.) What do you see? Does a river run through it? A cascading mountain brook with an icy breath? Are there cirques full of everlasting snow dotted in July with vermilion and gold flowers? Tarns of copper green glacial water reflecting white clouds sailing high overhead? Even if your imagined wilderness is a desert of rose-hued, striated rock and silent slot canyons or a horizon-reaching expanse of subtle shades of brown under an immense blue sky; water, or its scarcity, shapes the landscape, the colors, the wildlife, the experience of the place. In the desert, heat and light create mirages—the dream of water.

Water is integral to wilderness, essential to sustaining the communities of life that exist within the boundaries human beings draw around wild places. Without the full measure of its naturally occurring water, a wilderness will change; deprived of water it will die.

In contrast to wilderness, law is a creation of human beings, a framework for decision making, sets of rules and principles for ordering society and human interactions. It is constructed of rights and obligations. It determines who may use or consume natural resources, such as land, minerals, and water. In the western United States, water is essential not only to sustaining life, but to the development of the region. Water is the limiting factor for all growth and economic activity. The legal system of water allocation that grew up in the West emphasizes putting water to work wherever it is needed, and gives priority in use to those who arrive first and divert water from its natural courses for application to activities beneficial to humans. In the West water is separated from the land of its origins and moved over mountains. Until very recently, water left in streams for aesthetic or fish and wildlife purposes was viewed as wasted, and those who wasted water lost the right to use it.

Water and water rights are not the same thing. Wilderness needs water, but as a consequence of history and law, there is a question of whether—as a legal matter—areas designated as wilderness by Congress have rights to the water that arises within and flows through them. Al-

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though thirty-four years have passed since the Wilderness Act of 1964[1] created the National Wilderness Preservation System, the issue of wilderness water rights remains unresolved. The issue exists because Congress was silent in the Wilderness Act about water rights for the areas to be included in the Wilderness System.

Until 1988, the prevailing assumption was that congressional designation of a wilderness impliedly reserved sufficient federal water rights to fulfill the purposes of the designation. This presumption was based on the Supreme Court's application of the doctrine of federal reserved water rights to a variety of federal land systems, although the Court has not considered the issue of wilderness water rights directly. It was also based on the consistent position of the Solicitor of the United States Department of the Interior that wilderness has federal reserved water rights.[2] In 1988, following federal court decisions declaring wilderness to be a reservation carrying with it implied federal water rights, the Solicitor reversed the Department's position and decreed that the Wilderness Act specifically disclaimed the creation of any new water rights.[3] Armed with this Solicitor's Opinion, opponents of wilderness and some members of Congress claimed that wilderness lacks federal reserved water rights, and, therefore, any water for wilderness must be expressly provided in statutory language.[4]

The environmental community was deeply divided about how to respond to these assertions. Some environmentalists argued for the express reservation of water rights, to assure that wilderness areas designated by Congress would have the water necessary to their survival. For others, silence on water rights was golden. These environmentalists were concerned that, by accepting the view that express water rights language was necessary, they would be supporting the claim that wilderness areas designated by bills without such language have no water rights. The debate resulted in the defeat of a number of wilderness bills and the passage of wilderness legislation that include a variety of water rights provisions.[5]

Few wilderness areas have been designated since the early 1990s, in part because of conflicts over water rights. The wilderness bills that Congress has enacted included express references to water rights.[6] In

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1. Wilderness Act of 1964, Pub. L. No. 88-577, 78 Stat. 890 (codified as amended at 16 U.S.C. §§ 1131–1136 (1994)).

2. *See* 86 Op. Solic. Interior Dep't 553, 563–64 (1979) [hereinafter 1979 Solicitor's Opinion].

3. *See* 96 Op. Solic. Interior Dep't 211, 213 (1988) [hereinafter 1988 Solicitor's Opinion].

4. *See* Janice L. Weis, *Federal Reserved Water Rights in Wilderness Areas: A Progress Report on a Western Water Fight*, 15 HASTINGS CONST. L.Q. 125, 146–48 (1987) (discussing the legislative reaction to the then pending Colorado wilderness bill and noting legislative opposition to the claim that wilderness has federal reserved water rights).

5. *Cf. id.* at 146–47 (describing two Colorado water rights bills that "died without passage").

6. *See* John D. Leshy, *Instream Flow Rights: The Private and Public Roles*, C616 A.L.I.-A.B.A. 163, 167 (1991).

1994, the United States Department of Justice directed that the Solicitor's Opinion of 1988 be withdrawn pending a reexamination of the policy it expressed.[7] The withdrawal of the Solicitor's Opinion removed the bar to federal agency claims of reserved water rights for wilderness in general stream adjudications. It did not resolve the issue, however, and the application of the federal reserved water rights doctrine to wilderness remains unsettled.

This article will tell some of this story. It will analyze the issue of federal reserved water rights for wilderness, beginning with a bit of history on the development of the prior appropriation doctrine of water allocation in the West and the relationship between federal and state water law. It will examine the genesis of the federal reserved water rights doctrine and its application by the Supreme Court to a variety of federal land systems, and discuss the efforts of the Sierra Club to force the Forest Service to claim water rights for wilderness in stream adjudications in Colorado.

The article will then review the aftermath of the Sierra Club's effort, during which the Solicitor of the Department of the Interior repudiated the Department's long-standing recognition of federal reserved water rights for wilderness, and members of Congress wrangled over water rights language for wilderness bills under consideration.

Finally, the article will look at where the issue stands today. The controversy precipitated by the 1988 Solicitor's Opinion did not last all that long, yet the implications remain with us. Despite the withdrawal of the Opinion, states and private parties oppose federal claims to reserved water rights for wilderness.[8] Congress continues to fight about water rights language in wilderness bills. Because of the uncertainty about whether wilderness has federal reserved water rights, the question will reappear each time Congress considers a new addition to the National Wilderness Preservation System, or whenever the United States seeks to claim water rights for wilderness in a general stream adjudication. Whichever approach is taken may affect areas already in the Wilderness System. Wilderness, therefore, may, or may not, have rights to water.

II. A BIT OF HISTORY

Stephen Ambrose in his riveting account of the Lewis and Clark expedition said that one might "[a]s well try to stop an avalanche as to stop the moving frontier."[9] From the early 1800s on, land-hungry settlers

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7. *See* Water Rights Under the Wilderness Act, 59 Fed. Reg. 19,692 (1994).

8. *Cf.* Memorandum from Debbie Sease, Sierra Club, and Nancy Green, The Wilderness Society, to Western Field Representatives of both organizations on Water Rights and Silence 1–3 (Jan. 14, 1991) [hereinafter Sease & Green Memorandum] (on file with author) (describing the need to include water rights language in wilderness bills).

9. STEPHEN E. AMBROSE, UNDAUNTED COURAGE: MERIWETHER LEWIS, THOMAS JEFFERSON AND THE OPENING OF THE AMERICAN WEST 337 (1996).

pushed west beyond the confining hills of the Allegheny and Appalachian Mountains in an ever-increasing tide. "American immigrants and emigrants wanted their share of land—free land—a farm in the family—the dream of European peasants for hundreds of years—the New World's great gift to the old."[10] For nearly a century, but particularly between 1841 and the 1880s, the federal government promoted this settlement as the basis for national strength and security, by rewarding almost anyone who undertook the hardships of pioneering with land or natural resources.[11] The federal government made outright land grants to new states, military veterans and other individuals; promises of land in exchange for work were given to homesteaders, ranchers, and miners.[12] Later, Congress gave extensive grants to railroads, reclamation projects, and timber production.[13] All of this expressed the national policy of disposition of the public domain into the hands of the newly created American public.

The people who traveled west to settle and farm the land brought with them "hopes, dreams, and a totally unworkable system of water rights—the riparian system."[14] The riparian system, inherited from England, is suited to areas of abundant rainfall and numerous water courses. In the riparian system, the right to use water is incidental to ownership of land adjoining a water course. The governing principle is one of reasonable use. Riparian rights are correlative; each riparian owner has an equal right to use water and must share in times of shortage. Riparian rights are not lost through non-use.[15]

The arid conditions of the West made water the limiting factor for all land use and development.[16] Miners struggling to wrest metallic riches from the earth and irrigators laboring to keep crops and cattle alive in a region with rainfall of less than twenty inches per year quickly developed customs and practices that reflected the reality of the climate.[17] The first person on a stream to divert the water and apply it to a beneficial use, such as mining, stock watering or agriculture, established a priority to

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10. *Id.*

11. *See* GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 55–58 (3d ed. 1993).

12. *See id.* at 67, 79–80, 83, 85, 91–93.

13. *See id.* at 97–98, 103–06.

14. Nicholas Targ, *Water Law on the Public Lands: Facing a Fork in the River*, 12 NAT. RESOURCES & ENV'T. 14, 14 (1997).

15. For a discussion of the riparian system, see A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 3 (1998).

16. *See* WALLACE STEGNER, BEYOND THE HUNDREDTH MERIDIAN (1954); WALLACE STEGNER, THE SOUND OF MOUNTAIN WATER 33 (1969). *See generally* MARC REISNER, CADILLAC DESERT (1986) (discussing the development of water rights in various Western states); Wallace Stegner, *The Function of Aridity*, WILDERNESS, Fall 1987, at 14–21, 34 [hereinafter Stegner, *Aridity*] (discussing the effects of inadequate water supplies in the western United States).

17. *See* DYAN ZASLOWSKY & T.H. WATKINS, THESE AMERICAN LANDS 110, 118 (2d ed. 1994).

continue that use, even if later arrivals had no water.[18] Water use was not incident to land ownership; it could not be, since the land was in the public domain and owned by the federal government. Although a water right was regarded as a vested property right, a water user could not sit on the porch and watch water flow by. Water left in a stream was "wasted" and rights to its use lost.[19] Court decisions and legislatures subsequently legitimized these customs and practices as the prior appropriation doctrine of water allocation.[20]

Although it clearly did not need to do so, the federal government acquiesced in the establishment of water rights in the West through local customs and state laws. In a series of statutes between 1866 and 1877,[21] Congress acknowledged the validity of water rights granted by "local custom, laws, and decisions of courts."[22] The best known of these statutes, the Desert Land Act,[23] provided that settlers and homesteaders on the public lands would have rights to water "necessarily used for the purpose of irrigation and reclamation," and that all other unappropriated water, from whatever source, "shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights."[24]

The Supreme Court enthusiastically supported federal acquiescence to state water law. In *California Oregon Power Co. v. Beaver Portland*

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18. *See* Stegner, *Aridity*, *supra* note 16, at 16.

19. *See* REISNER, *supra* note 16, at 12. Reisner expressed the idea as follows:

> In the West, lack of water is the central fact of existence, and a whole culture and set of values have grown up around it. In the East, to "waste" water is to consume it needlessly or excessively. In the West, to waste water is *not* to consume it—to let it flow unimpeded and undiverted down rivers.

Id.

20. *Cf., e.g.*, TARLOCK, *supra* note 15, § 5 (describing the loss of water rights through nonuse and abandonment under the prior appropriation doctrine); Owen L. Anderson et al., *Prior Appropriation*, *in* WATERS AND WATER RIGHTS, §§ 11–15, 17 (Robert E. Beck ed., 1991) (explaining that under certain circumstances, water rights may be lost by nonuse).

21. *See* Pamela Baldwin, *Wilderness Areas and Federal Water Rights*, Cong. Research Serv. 1, 4 (Jan. 4, 1989). As noted by Ms. Baldwin, the Supreme Court, in *United States v. New Mexico*, cited congressional hearings listing 37 statutes "in which Congress has expressly recognized the importance of deferring to state water law." United States v. New Mexico, 438 U.S. 696, 702 n.5 (1978) (citing *Federal-State Water Rights: Hearings on S. 1275 Before the Subcomm. on Irrigation and Reclamation of the Senate Comm. on Interior and Insular Affairs*, 88th Cong. 302–10 (1964)); *see* Baldwin, *supra*, at 4.

22. An Act Granting the Right of Way to Ditch and Canal Owners Over the Public Lands, and for Other Purposes, ch. 262, § 9, 14 Stat. 251, 253 (codified as amended at 43 U.S.C. § 661 (1994)). The provision, which is typical of the statutes noted above, states in full:

> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decision of courts, the possessors and owners of such vested rights shall be maintained and protected in the same . . . .

Id.

23. Desert Land Act of 1877, ch. 107, 19 Stat. 377 (codified as amended at 43 U.S.C. § 321 (1994)).

24. *Id.* § 1, 19 Stat. at 377.

Cement Co.,[25] for example, the Court praised the states' prior appropriation doctrine as essential to "the future growth and well-being of the entire region."[26] The Desert Land Act, said the Court, "effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself."[27] Thus, "following the act of 1877, if not before, all nonnavigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states."[28]

III. DEVELOPMENT OF THE FEDERAL RESERVED RIGHTS DOCTRINE

A. *Reserved Water Rights for Native American Reservations*: Winters v. United States[29]

Despite the assumption that state law would govern the appropriation of water, even on federal lands, the states' right to control water allocation was, and continues to be, subject to overriding federal power. Under the Constitution, Congress has the authority to regulate and control navigation,[30] interstate commerce,[31] and the federal lands.[32] Moreover, state law in conflict with federal law must yield under the Constitution's Supremacy Clause.[33] The Supreme Court has consistently held that federal water rights exist where Congress chooses to preempt state law, and where necessary, to fulfill federal purposes.[34] These rights are reserved from state appropriation and provide for federally controlled and managed water for the public lands.[35]

Of course, the federal government may apply for water rights under state law, as any other property owner. There are many occasions, however, when a right acquired under state law may not adequately serve the federal purposes.[36] For example, some state laws require a diversion of water as a prerequisite to obtaining a water right, which may interfere

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25. 295 U.S. 142 (1935).

26. *California Or. Power*, 295 U.S. at 157.

27. *Id.* at 158.

28. *Id.* at 163–64.

29. 207 U.S. 564 (1908).

30. *See* United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 703 (1899); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 3 (1824).

31. In *Sporhase v. Nebraska*, the Supreme Court held that water itself is an article of commerce and, therefore, is subject to federal regulation. 458 U.S. 941, 953–54 (1982).

32. The "Property Clause" authorizes Congress to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2. The federal government owns the public domain as both an ordinary proprietor and as sovereign. *Cf.* Kleppe v. New Mexico, 426 U.S. 529, 539 (1976) (interpreting the federal government's authority over the public lands as virtually without limitation).

33. U.S. CONST. art. VI, § 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

34. *See* 6 Op. Off. Legal Counsel 328, 346 (1982); Targ, *supra* note 14, at 16.

35. *See* Winters v. United States, 207 U.S. 564, 577 (1908).

36. *See* Baldwin, *supra* note 21, at 7.

with a federal purpose to maintain an area in a natural condition. Even those states which recognize instream flow rights usually severely limit the quantity of those rights and rank them behind consumptive uses.[37] Furthermore, it seems somewhat incongruous for the federal government to have to go with bucket in hand to the states to ask for water to sustain the natural resources of the federal lands.[38]

The Supreme Court first alluded to the existence of federal reserved water rights in *United States v. Rio Grande Dam & Irrigation Co.*[39] In *Rio Grande*, the Court considered whether an irrigation company, operating under state law, could be enjoined from diverting water at a rate that threatened the navigability of a river.[40] The Court held that the state law was subject to the federal government's superior authority over navigable waters:

> [I]n the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property. . . .[41]

The doctrine of federal reserved rights was more fully developed in *Winters v. United States*;[42] indeed, it is frequently called the "*Winters* Doctrine." The *Winters* case involved a conflict between claims for water of Native Americans living on the Fort Belknap Reservation in Montana and upstream settlers using water pursuant to perfected state water rights.[43] In 1888, the reservation originally set aside for many of the tribes living in Montana was reduced in size, with the agreement of the Native Americans.[44] The smaller reservation was thought to be more suitable for

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37. *See id.*; *see also* A. Dan Tarlock, *The Recognition of Instream Flow Rights: New Public Western Water Rights*, 25 ROCKY MTN. MIN. L. INST. 24-1, 24-2 to -3 (1979) (describing instream use as vulnerable).

38. The United States does participate as a party in general stream adjudications, which are proceedings held pursuant to state water law to determine the rights and priorities of all water rights holders on a stream or stream system. The McCarran Amendment, 43 U.S.C. § 666(a) (1994), waives the sovereign immunity of the United States and permits the federal government to be joined in lawsuits adjudicating all the rights on a river system, including federal reserved rights. *See* Dugan v. Rank, 372 U.S. 509, 618 (1963); *see also* Tarlock, *supra* note 15, § 7.03 (discussing how administrative adjudication qualifies for a waiver of sovereign immunity under the McCarran Amendment provided there is ultimately a judicial determination of the claims). For a history of the McCarran Amendment, see John E. Thorson, *State Watershed Adjudications: Approaches and Alternatives*, 42 ROCKY MTN. MIN. L. INST. 22-1, 22-6 to -7, 22-13 to -19 (1996).

39. 174 U.S. 690 (1899).

40. *See Rio Grande Dam*, 174 U.S. at 690.

41. *Id.* at 703.

42. 207 U.S. 564 (1908).

43. *See Winters*, 207 U.S. at 565.

44. *See id.* at 575–76.

promoting an agrarian way of life.[45] It also permitted the United States to make the remaining land available for settlement.[46]

The settlers who moved into the newly opened lands wanted water for agriculture and domestic purposes. By 1900, upstream settlers began to appropriate water from the Milk River, diminishing the flow available to the Native Americans.[47] The United States, on behalf of the tribes, asserted a right to the water, based on Congress's purposes in creating the reservation.[48]

The Supreme Court ruled in favor of the Native Americans, finding that water sufficient to carry out the purposes of the reservation was reserved when the lands were set aside.[49] The Court acknowledged that neither the treaty with the Native Americans establishing the reservation nor the act of Congress ratifying that treaty explicitly created water rights.[50] The Court reasoned, however, that Congress intended to reserve the water simultaneously with the land because, without water, the arid land would be useless and the purpose of the agreement would be defeated.[51] Thus, "[t]he power of the [federal] government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be."[52] *Winters* established that water may be reserved by implication, notwithstanding state law or the existence of state water rights conferred after the creation of a federal land reservation. The *Winters* Doctrine superimposes judicially created federal water rights on a state system that bases water rights on prior appropriation.

B. *Extension of the Winters Doctrine to Other Federal Land Reservations*

For many years, it was assumed that the *Winters* Doctrine applied only to Native American reservations.[53] The Supreme Court reinforced this presumption in *California Oregon Power Co. v. Beaver Portland Cement Co.*,[54] in which the Court reaffirmed the effect of the Desert Land Act on the water resources of the public domain.[55] It was not until 1955 that the Supreme Court held that federal reserved water rights are created by implication when Congress sets aside federal lands other than Native American reservations. In *Federal Power Commission v. Oregon*[56] (*Pelton Dam*), the Court held that the federal land laws, which had severed

45. *Cf. id.* at 576.
46. *See id.* at 568.
47. *See id.* at 567.
48. *See id.* at 576.
49. *See id.*
50. *See id.*
51. *See id.*
52. *Id.* at 577.
53. *See* Baldwin, *supra* note 21, at 5; Weis, *supra* note 4, at 131.
54. 295 U.S. 142 (1935).
55. *See California Oregon Power*, 295 U.S. at 157–58, 163–64.
56. 349 U.S. 435 (1955).

water rights from land conveyed to federal patentees, applied only to public domain lands, not to reserved lands.[57] This meant that state law did not control the disposition of water on federal reservations.[58]

Thirteen years after the *Pelton Dam* case and fifty-five years after *Winters*, the Supreme Court, in *Arizona v. California*,[59] extended the federal reserved rights doctrine to national recreation areas, national forests, and wildlife refuges.[60] Subsequently, the Supreme Court and a number of lower courts have applied the doctrine to military facilities,[61] national monuments,[62] national parks,[63] subterranean waterholes,[64] and mineral hot springs.[65] The cases "put the pieces together into the following rule:"[66]

> This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. Reservation of water rights is empowered by the Commerce Clause, Art. I, § 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, § 3, which permits federal regulation of federal lands. The doctrine applies to [Native American] reservations and

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57. *See Pelton Dam*, 349 U.S. at 444–46. The Court held that the Federal Power Commission was not required to obtain the consent of the State of Oregon before it permitted a private company to construct and operate a hydroelectric dam on federal lands, even though, as Justice Douglas noted in his dissent, the water that would flow through the dam theoretically belonged to the state. *See id.* at 452–53 (Douglas, J., dissenting). The decision implied that the licensee was exercising a right of the federal government to use water reserved at the time the dam site was reserved. *See id.* at 443–45; *see also* 1988 Solicitor's Opinion, *supra* note 3, at 213. The Departments of Agriculture and Interior suspended and subsequently withdrew the 1988 Solicitor's Opinion's decision regarding the filing of water rights claims for federally designated lands in the National Wilderness Preservation System. *See* 58 Fed. Reg. 68,629 (1993); 59 Fed. Reg. 19,692 (1994).

58. *Cf.* Baldwin, *supra* note 21, at 5–6.

59. 373 U.S. 546 (1963).

60. *See Arizona*, 373 U.S. at 601. The Court stated:

> The [Water] Master ruled that the principle underlying the reservation of water rights for [Native American] Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. We agree with the conclusions of the Master that the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest.

Id. The Supreme Court considered the question of the extent of the federal reserved water rights for National Forests in *United States v. New Mexico*, 438 U.S. 696, 698 (1978).

61. *See* Nevada *ex rel.* Shamberger v. United States, 165 F. Supp. 600, 604 (D. Nev. 1958), *rev'd on other grounds*, 279 F.2d 699 (9th Cir. 1960).

62. *See* Cappaert v. United States, 426 U.S. 128, 142 (1976).

63. *See* United States v. Denver, 656 P.2d 1, 30 (Colo. 1982).

64. *See Denver*, 656 P.2d at 31–32.

65. *See id.* at 33–34. For a discussion of the application of the reserved rights doctrine to the various federal land systems, see Harold A. Ranquist, *The Winters Doctrine and How It Grew; Federal Reservation of Rights to the Use of Water*, 1976 BYU L. REV. 639, 641; Targ, *supra* note 14, at 16–18; Weis, *supra* note 4, at 130–31.

66. Baldwin, *supra* note 21, at 6.

> other federal enclaves, encompassing water rights in navigable and nonnavigable streams.[67]

In sum, the courts recognize that federal reserved water rights may be inferred from a congressional (or executive) reservation of federal land.[68] However, simply because Congress has the authority to reserve water rights for an area set aside for particular purposes does not mean that it, in fact, has done so.

Four questions arise. The first two are whether Congress's action with respect to the federal land involved constitutes a "reservation," i.e., the dedication of an area of the public domain for specified purposes;[69] and if so, whether Congress intended to reserve water rights, either explicitly or by implication, in the legislation effecting the reservation. Intent may be inferred if unappropriated water is necessary to accomplish the purposes for which the reservation was created.[70] The third and fourth questions concern the date on which the reserved rights vest in the United States, which is generally simultaneous with the reservation of the land, and the extent of the water rights reserved. The federal reserved rights doctrine reserves "only that amount of water necessary to fulfill the [*primary*] purpose[s] of the reservation, no more."[71] As the Supreme Court stated in *United States v. New Mexico*:

> Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.[72]

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67. *Cappaert*, 426 U.S. at 138 (citing Colorado River Water Cons. Dist. v. United States, 424 U.S. 800, 805 (1976)).

68. In *Arizona v. California*, 373 U.S. 546 (1963), the State of Arizona argued that an Executive Order could not reserve water rights. The Court stated:

> In our view, these reservations, like those created directly by Congress, were not limited to land, but included waters as well. . . . We can give but short shrift at this late date to the argument that the reservations either of land or water are invalid because they were originally set apart by the Executive.

Arizona, 373 U.S. at 598.

69. *Cf.* Sierra Club v. Block, 622 F. Supp. 842, 854–55 (discussing the definition of "reservation" and distinguishing reserved lands from those "withdrawn" from the public domain). For a discussion of *Block* and subsequent proceedings, see *infra* notes 101–57 and accompanying text.

70. *See Cappaert*, 426 U.S. at 138; *see also Arizona*, 373 U.S. at 600; *Block*, 622 F. Supp. at 852–53.

71. *Cappaert*, 426 U.S. at 141; *see* United States v. New Mexico, 438 U.S. 696, 700 (1978).

72. *New Mexico*, 438 U.S. at 702. In *New Mexico*, the Supreme Court ruled that the "outdoor recreation, range, timber, watershed, and wildlife and fish" purposes of National Forests identified in section 528 of the Multiple Use Sustained Yield Act of 1960, 16 U.S.C. § 528 (1994), are "supplemental to" the primary purposes of "improv[ing] and protect[ing] the forest . . . securing favorable

All four of these questions are raised by the issue of federal reserved water rights for wilderness. Is wilderness a reservation? Did Congress intend to give wilderness areas water rights? How much water is set aside for designated wilderness areas? When do the water rights, if any, vest?

IV. FEDERAL RESERVED WATER RIGHTS FOR WILDERNESS

A. *The Language and Legislative History of the Wilderness Act*

The Wilderness Act is silent concerning water rights reserved for the wilderness areas designated under its authority. The Act does include two rather cryptic references to water. The first, section 4(d)(4), provides for the construction of facilities for water diversion or impoundment within wilderness areas upon the President's determination that such development is in the public interest.[73] It was included in S. 1176, the 1957 version of the Wilderness Bill,[74] and has never been used.[75]

The second reference to water, section 4(d)(6) of the Wilderness Act, states, "Nothing in this [Act] shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws."[76] Section 4(d)(6) first appeared in 1958 in S. 4028.[77]

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conditions of water flows, and . . . furnish[ing] a continuous supply of timber" set forth in section 475 of the Organic Administration Act of 1897, 16 U.S.C. § 475 (1994). *New Mexico*, 438 U.S. at 713–14. The Court held that the federal water rights reserved for National Forests are limited to those required to fulfill the primary purposes. *See New Mexico*, 438 U.S. at 712–13, 715. This ruling prompted Justice Powell to doubt that "the forests which Congress intended to 'improve and protect' are the still, silent, lifeless places envisioned by the Court." *Id.* at 719 (Powell, J., dissenting). The Justice further stated:

> In my view, the forests consist of the birds, animals, and fish—the wildlife—that inhabit them, as well as the trees, flowers, shrubs, and grasses. I therefore would hold that the United States is entitled to so much water as is necessary to sustain the wildlife of the forests, as well as the plants.

Id. (Powell, J., dissenting).

73. *See* Wilderness Act § 4(d)(4), 16 U.S.C. § 1133(d)(4) (1994). The legislative history of this section indicates that it was intended to allow "minor water resource conservation measures [and] small watershed developments." John D. Leshy, *Water and Wilderness/Law and Politics*, 23 LAND & WATER L. REV. 389, 402 n.53 (1988) (construing 109 CONG. REC. 5892 (1963) (statement of Sen. Frank Church)).

74. *See* Patricia Byrnes & Burnita A. Bell, *The Wilderness Society and the Wilderness Bill*, 58 WILDERNESS 4, 4 (1994). The first wilderness bill was introduced in the Senate on June 7, 1956 by Sen. Hubert Humphrey. It took eight years, 18 hearings, and some 66 versions of the bill before Congress approved the Wilderness Act of 1964. *See id.* at 4; *see also* ZASLOWSKY, *supra* note 17, at 218–20 (recounting milestones in wilderness legislation since the Wilderness Act).

75. *See* Leshy, *supra* note 73, at 402. The most significant attempt to invoke section 4(d)(4) occurred when the Denver Water Board sought to build a trans-basin diversion in the Eagle's Nest Wilderness above Vail, Colorado. *See id.* at 402 n.54.

76. Wilderness Act § 4(d)(7), 16 U.S.C. § 1133(d)(6). This section was originally enacted as section 4(d)(7). *See* 1988 Solicitor's Opinion, *supra* note 3, at 211. The Act of Oct. 21, 1978, Pub. L. No. 95-495, 92 Stat. 1650 (codified as amended at 43 U.S.C. §§ 1701–1784 (1994)), repealed former item (5) of section 4(d) (having to do with the Boundary Waters Canoe Area), and renumbered the remaining items. Although the reference to section 4(d)(6) is correct, many commentators, courts,

The provision was included in the bill to respond to concerns expressed by the California Department of Water Resources expressed during hearings on S. 1176 in 1957.[78] There is also some indication that the sentence was adapted from proposals made by the United States Forest Service,[79] which steadfastly opposed wilderness legislation throughout its eight years of consideration by the Congress.

As initially introduced, the provision stated that nothing in the Wilderness Act constituted "an express or implied claim on the part of the United States for exemption from State water laws."[80] This was changed to the final "no claim or denial" language.[81]

Little contemporaneous evidence exists as to the intended meaning of the new language. The Congressional Research Service (CRS) Report on Wilderness Areas and Water Rights reviewed what there is, including the report of the House Interior and Insular Affairs Committee, which stated, "Federal-State *relationships* concerning water laws and wildlife are maintained without change,"[82] and the comment of Senator Hubert Humphrey, one of the principal sponsors of the legislation, who said of the new language:

> Paragraph 5, the last in this section, contains language vital to colleagues from the West. When the first wilderness bill was being discussed, some of its opponents charged that its enactment would change existing water laws and would deprive local communities of water, both domestic and irrigation. Although this was certainly not the intention of the sponsors, it has seemed necessary to insert a short sentence to remove any doubts.[83]

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and the Solicitor of the United States Department of the Interior refer to it as section 4(d)(7). *See* 1988 Solicitor's Opinion, *supra* note 3, at 219–31.

77. *See* 1988 Solicitor's Opinion, *supra* note 3, at 221.

78. *See Nat'l Wilderness Preservation Act: Hearings on S. 1176 Before the Senate Comm. on Interior and Insular Affairs*, 85th Cong. 286–87 (1957) [hereinafter *S. 1176 Hearings*] (statement of William Berry, Chief of Division of Resources Planning, California Department of Water Resources). Apparently, the California agencies were concerned about the effect of decisions, such as the *Pelton Dam* case, on state water law. To address their concerns, the agencies proposed an amendment to S. 1176 to subject all unappropriated water in wilderness areas to appropriation in accordance with state law. *See id.*; *see also* 1988 Solicitor's Opinion, *supra* note 3, at 220–26 (addressing concerns over the extension of the reserved rights doctrine and its potentially overreaching effect on state water law); Baldwin, *supra* note 21, at 30–32 (discussing proposed changes in the bill by the western states to assure the integrity and maintenance of state water law).

79. *Cf. S. 1176 Hearings*, *supra* note 78, at 286–87 (1957) (statement of William Berry, Chief of Div. of Resources Planning, Cal. Dep't of Water Resources).

80. Baldwin, *supra* note 21, at 32.

81. *See id.* at 32–33; *see also* 1988 Solicitor's Opinion, *supra* note 3, at 224; *infra* text accompanying notes 164–73.

82. *See* Baldwin, *supra* note 21, at 28–29 (quoting H.R. REP. NO. 87-2521, at 27 (1962)).

83. *Id.* at 34–35 (quoting 104 CONG. REC. 11,555 (daily ed. June 18, 1958) (statement of Sen. Hubert Humphrey)).

Based on an extensive examination of other legislative history of the Wilderness Act, the CRS concluded that the most probable interpretation of section 4(d)(6) is that the Wilderness Act is not meant to change existing state water law, but to acknowledge the existence of both federal and state water rights.[84] Indeed, the federal government read the section this way until 1988, when the Interior Department Solicitor issued his Opinion interpreting the section as expressly disclaiming the creation of water rights for wilderness.[85]

Although the meaning of section 4(d)(6) is subject to conflicting interpretations, Congress later used the same language in the National Wildlife Refuge System Administration Act of 1966[86] and the Wild and Scenic Rivers Act of 1968.[87] The Refuge System Act does not explain the provision, and the Supreme Court in *Arizona v. California* held that federal reserved water rights exist for National Wildlife Refuges, without referring to section 4(d)(6).[88]

Many of the key proponents of the Wilderness Act, including Senators Humphrey and Kuchel, sponsored the Wild and Scenic Rivers Act of 1968.[89] In contrast to the Wilderness Act, the Wild and Scenic Rivers Act expressly reserves water rights sufficient to fulfill the purposes of the Act.[90] It also includes the "neither claim or denial" language used in the Wilderness Act.[91] These facts led the CRS to conclude that the language indicated Congress's intent to preserve the status quo of water law, which recognizes both federal reserved and state appropriated water rights.[92] Under the status quo, neither the Wilderness Act nor the Wild and Scenic Rivers Act would affect valid existing water rights perfected under state law or prevent future appropriations unless they impaired statutory purposes or the administration of the federal statute.[93]

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84. *See id.* at 35.

85. *See* 1988 Solicitor's Opinion, *supra* note 3, at 213. For discussion of the Solicitor's Opinion, see *infra* Part V.

86. *See* 16 U.S.C. § 668dd(i) (1994).

87. *See* 16 U.S.C. § 1284(b) (1994).

88. *See* Arizona v. California, 373 U.S. 546, 601 (1963). In *United States v. Vesterso*, 828 F.2d 1234 (8th Cir. 1987), the Eighth Circuit interpreted the claim or denial language as used in the National Wildlife Refuge System Administration Act. The court said that the purpose of the provision was to maintain federal-state relationships concerning water laws without change, to prevent a general preemption of state water laws as they affected federal easements. *See Vesterso*, 828 F.2d at 1240. The *Vesterso* court cited *Sierra Club v. Block*, 622 F. Supp. 842 (D. Colo. 1985), with approval. *See Vesterso*, 828 F.2d at 1240.

89. 16 U.S.C. §§ 1271–1287 (1994); *see* Baldwin, *supra* note 21, at 38.

90. *See* 16 U.S.C. § 1284(c).

91. *See id.* § 1284(b).

92. *See id.*

93. *See id.*

B. *Judicial Consideration of Wilderness Federal Reserved Water Rights*

For more than twenty years, the general assumption was that wilderness, like other federal land systems, had federal reserved water rights. The System grew steadily from its birth weight of 9.1 million acres in 1964, with the addition of new areas within national forests, national parks, and national wildlife refuges.[94] (The Bureau of Land Management did not receive a wilderness mandate until the enactment of the Federal Land Policy and Management Act of 1976,[95] and has moved with glacial speed since that time to evaluate and recommend areas for wilderness designation.) Between 1964 and 1988, virtually all of the bills creating wilderness areas said nothing about water rights. A few bills repeated the language of section 4(d)(6).[96]

In 1979, the Solicitor of the Department of the Interior analyzed the nature and extent of federal reserved water rights for several federal land systems, including wilderness.[97] After reviewing the legislative purposes of "preserving and protecting wilderness in its natural condition without permanent improvements or human habitation, to fulfill public purposes of recreation, scenic, scientific, educational, conservation, and historic use,"[98] the Solicitor's Opinion concluded that "formally designated wilderness areas receive reserved water rights necessary to accomplish these purposes."[99] Subsequent Solicitors modified this Opinion, but the section on wilderness was unchanged until 1988.[100]

No court considered the issue of whether designated wilderness has federal reserved water rights until 1985, when the Sierra Club sued the United States Forest Service for its failure to claim federal reserved water rights for Colorado wilderness areas. In *Sierra Club v. Block*,[101] the Sierra Club sought a judicial determination that wilderness areas have reserved rights and that the federal agencies charged with management responsibility for these areas are obligated to protect them.[102]

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94. *See* Margaret Shulenberger, Annotation, *Construction and Application of Wilderness Act (16 U.S.C.A. §§ 1131 et seq.) Providing for National Wilderness Preservation System*, 14 A.L.R. FED. 508 nn.5–6 (1973).

95. Federal Land Policy and Management Act of 1976 § 603, 43 U.S.C. § 1782 (1994).

96. *See* Arizona Wilderness Act of 1984, Pub. L. No. 98-406, § 101(e)(1), 98 Stat. 1485, 1488; California Wilderness Act of 1984, Pub. L. No. 98-425, § 304(h), 98 Stat. 1619, 1624 (codified as amended at 16 U.S.C. § 543c(h) (1994)).

97. *See* 1979 Solicitor's Opinion, *supra* note 2, at 553.

98. *Id.* at 609 & n.104.

99. *Id.* at 609–10.

100. *See* COGGINS, *supra* note 11, at 386–87, 397.

101. 622 F. Supp. 842, 846 (D. Colo. 1985).

102. *See Block*, 622 F. Supp. at 846. To date, the only other case to consider whether federal agencies have a duty to protect federal reserved water rights is *Sierra Club v. Andrus*, 487 F. Supp. 443, 451–52 (D.D.C. 1980), *aff'd sub nom.* Sierra Club v. Watt, 659 F.2d 203, 206 (D.C. Cir. 1981). The court concluded that federal agencies have discretion to use whatever methods they choose to protect wilderness water. *See Andrus*, 487 F. Supp. at 448.

As John Leshy observed, the controversy began modestly enough.[103] The states had won "[a] series of bruising battles over the extent to which the state courts could adjudicate federal *Winters* rights," and now had the opportunity in general stream adjudications to quantify the federal right and fold it into the state water rights system.[104] In Colorado, the Forest Service, faced with a deadline to file water rights claims in a stream adjudication, refused to assert federal reserved rights for the wilderness areas affected by the adjudication.[105] According to Leshy, the federal government decided "to relinquish its claim to a valuable property right by not asserting it in the adjudication. The Sierra Club sued, and the fun began."[106]

The defendant-intervenors in the case argued that the Wilderness Act does not reserve lands.[107] Rather, it reclassifies previously withdrawn and reserved lands and, therefore, wilderness areas are limited to the water rights set aside for the land system from which they are created.[108] The Wilderness Act is simply a "set of statutory land management directives."[109] Wilderness purposes are secondary, claimed the defendant-intervenors, and Congress did not intend to reserve additional water rights for them.[110]

The defendant-intervenors based much of their argument on the Supreme Court's decision in *United States v. New Mexico*.[111] In *New Mexico*, the Supreme Court held that the additional purposes created by the Multiple Use Sustained Yield Act of 1960 (MUSY)[112] for national forests were supplemental to the primary purposes for which forests were reserved under the Forest Service Organic Act,[113] and, therefore, did not provide additional water rights.[114]

The *Block* court rejected this argument, based on the language and legislative history of the Wilderness Act.[115] The court stated that, although wilderness designation was not the *original* withdrawal and reservation from the public domain, it does not follow that wilderness is not withdrawn and reserved.[116] In particular, the court noted that wilderness

103. *See* Leshy, *supra* note 73, at 392.
104. *Id.*; *see supra* note 38 (explaining general stream adjudications).
105. *See* Leshy, *supra* note 73, at 392.
106. *Id.*
107. *See Block*, 622 F. Supp. at 851.
108. *See id.*
109. *Id.* at 855.
110. *See id.* at 859.
111. 438 U.S. 696, 715 (1978).
112. 16 U.S.C. §§ 528–531 (1994).
113. 16 U.S.C. §§ 473–482, 551 (1994).
114. *See New Mexico*, 438 U.S. at 715.
115. *See Block*, 622 F. Supp. at 855–58.
116. *See id.* at 857–58. Wilderness areas are created from lands in national forests, national parks, national wildlife refuges, as well as public domain lands under the jurisdiction of the Bureau of Land Management. *See id.* at 858.

areas established pursuant to the Act are withdrawn from use-related laws that permit activities inconsistent with the preservation of wilderness qualities, and are dedicated for particular federal purposes.[117] These purposes include their "preservation and protection in their natural condition . . . to secure for the American people of present and future generations the benefits of an enduring resource of wilderness."[118] The legislative history of the Wilderness Act, said the court, reveals that the creation of a National Wilderness Preservation System was "foremost in the minds of the members of Congress."[119] The court distinguished the Supreme Court's analysis of MUSY in *New Mexico*, ruling that the Wilderness Act does not "constitute an attempt to *add* to the primary purposes of existing reservations," but is instead "*initial legislation* creating an *entirely new reservation* of federal lands."[120]

After finding that the Wilderness Act effected a withdrawal and reservation of water rights, the court considered the question of whether Congress intended to reserve unappropriated water for those areas. It relied on the Supreme Court's rulings in *Cappaert* and *New Mexico* that intent to reserve water rights may be inferred if unappropriated water is necessary to accomplish the primary purposes for which the reservation was created.[121] To determine the primary purposes of wilderness, the court carefully reviewed the statements of purpose contained in the Wilderness Act that "wilderness areas shall be devoted to the public purposes of recreation, scenic, scientific, educational, conservation, and historical use."[122] The court also cited the remarks of various members of Congress that "the primary motivation of Congress in establishing the wilderness preservation system was to 'guarantee[] that these lands will be kept in their original untouched natural state.'"[123] The court determined that, unlike MUSY, all of the purposes expressed in the Wilderness Act are primary.[124] Congress, therefore, reserved sufficient water to fulfill all of them.[125] The court emphasized that "water is the lifeblood of the wilderness areas. Without water, the wilderness would become deserted wastelands [and] . . . the very purposes for which the Wilderness Act was established would be entirely defeated. Clearly, this result was not intended by Congress."[126]

Although the court ruled that Congress reserved water rights by wilderness designation, it did not find the agency's failure to claim the

117. *See id.*
118. *Id.* at 850 (quoting Wilderness Act § 4(a), 16 U.S.C. § 1133(a) (1994)).
119. *Id.* at 858.
120. *Id.* at 860.
121. *See id.* at 853.
122. *Id.* at 858 (quoting Wilderness Act § 4(b), 16 U.S.C. § 1133(b)).
123. *Id.* at 850 (quoting 110 CONG. REC. 17,448 (1964) (statement of Rep. Cleveland)).
124. *See id.* at 862.
125. *See id.*
126. *Id.*

rights to be arbitrary and capricious.[127] Instead, it held that federal agencies have a duty to protect the water resources of wilderness areas, but no specific statutory obligation to claim federal reserved water rights.[128]

> These [Wilderness Act] mandates evince Congress' intent to impose a duty on the administering agencies to protect and preserve all wilderness resources, including water. Thus, there is a general duty under the Wilderness Act to protect and preserve wilderness water resources. There is, however, no specific statutory duty to claim reserved water rights in the wilderness areas even though Congress impliedly reserved such rights in order to effectuate the purposes of the Act. . . . [R]eserved water rights is only one of several tools available to federal defendants to meet their statutory duty to protect and preserve wilderness water resources.[129]

The government argued that it had alternative ways to protect wilderness water and did not need to claim federal reserved rights. The court found the record on these alternative approaches inadequate and remanded the matter to the Forest Service to prepare a more definite statement of the agency's plans to protect water in Colorado's wilderness in light of the ruling that the Wilderness Act reserved water rights.[130]

Addressing the government's subsequent appeal in *Sierra Club v. Lyng*,[131] the Tenth Circuit held that it lacked jurisdiction to hear the case because the Forest Service had not prepared its plan and, consequently, the district court's order was not final and reviewable.[132]

In November of 1986, the Forest Service submitted its report.[133] Two months later, the Sierra Club filed a second lawsuit challenging the sufficiency of the agency's plan for protecting wilderness water in Colorado.[134] The district court reiterated its earlier holding that "federal

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127. *See id.* at 864–65.

128. *See id.* at 864.

129. *Id.* at 864–65. The court in *Sierra Club v. Andrus*, 487 F. Supp. 443, 448 (D.D.C. 1980), reached the same conclusion with respect to the protection of water resources for national parks and recreation areas. At least two commentators argue that the court was mistaken in holding that federal agencies have discretion to use whatever methods they choose to protect wilderness water. *See* Robert H. Abrams, *Water in the Western Wilderness: The Duty to Assert Reserved Water Rights*, 1986 U. ILL. L. REV. 387, 395–99 (1986); Jason Marks, Comment, *The Duty of Agencies to Assert Reserved Water Rights in Wilderness Areas*, 14 ECOLOGY L.Q. 639, 659 (1987). They also maintain that both the doctrine of federal reserved water rights and the Wilderness Act indicate that agencies have an obligation to protect water *rights* as well as water *flows*. *See* Abrams, *supra*, at 396–99; Marks, *supra*, at 659. Only Congress has the authority to designate a wilderness. When it does so, under the doctrine of federal reserved water rights, it also reserves the water rights necessary to fulfill the purposes of the reservation. *See id.* at 639. Reserved water rights are not just one technique available to the agency; they are the mechanism chosen by Congress. Federal agencies lack discretion to ignore Congress's action. *See id.* at 655–659, 661.

130. *See Block*, 622 F. Supp. at 865.

131. 661 F. Supp. 1490, 1492 (D. Colo. 1987).

132. *See Lyng*, 661 F. Supp at 1492.

133. *See id.*

134. *See id.* at 1490.

reserved water rights do exist in previously unappropriated water" in wilderness areas designated pursuant to the Wilderness Act.[135] It then turned to the plan and concluded that the alternatives suggested by the agency "present[ed] an abuse of discretion under 5 U.S.C. § 706(2)(A)."[136] The court found the Forest Service's plan was "woefully inadequate and constitute[d] an insouciant disregard of the government's statutory responsibility to protect wilderness area federal reserved water rights."[137] It rejected the plan and ordered the Forest Service to try again.[138] In doing so, the court recognized that a political agenda was clearly at work:

> [T]he issues in this case are permeated with conflicting philosophical views and economic interests which properly should be resolved by the political branches of government. . . . [However, u]ntil enlightened by a more precise articulation of legislative policy, it is my intent to enforce with vigor the intent of Congress as I perceive it to be.[139]

In the second round of this litigation, the court addressed a new claim advanced by the defendant-intervenors that the legislative history of section 4(d)(6) of the Wilderness Act (the "neither claim or denial" provision) indicated that Congress did not intend to create any new federal water rights which would interfere with water development by the states.[140] The federal government disagreed with the defendant-intervenors, asserting that section 4(d)(6) and its legislative history reflected Congress's intent to be "neutral" on the question of federal reserved water rights and existing state water law.[141]

The court declined to "delve into the labyrinthine complexities" of the parties' arguments and relied instead on the "plain reading" of the section.[142] The court decided that section 4(d)(6) is "simply a disclaimer," expressing Congress's wish to "maintain the status quo of basic water law."[143] Rather than bolster the intervenors' arguments, said the court, the section negated them because it does not work any substantive change in

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135. *Id.* at 1492 (quoting *Block*, 622 F. Supp. at 862).

136. *Id.* at 1501.

137. *Id.*

138. A more detailed second report was filed, which again concluded that water for wilderness could be protected without claiming federal reserved rights. *See* COGGINS, *supra* note 11, at 397. "The Sierra Club did not challenge the substance of this report and the district court entered a final judgment simply declaring that the Wilderness Act reserved water rights under the *Winters* Doctrine." *Id.*; *cf.* Sierra Club v. Yeutter, 911 F.2d 1405, 1422 (10th Cir. 1990) (repudiating the government's contention that Forest Service inaction could not be adjudicated in federal court).

139. *Lyng*, 661 F. Supp. at 1502.

140. *See id.* at 1492–93.

141. *See id.* at 1493.

142. *Id.*

143. *Id.*

the rights parties may acquire under the various doctrines of water law, including the reserved rights doctrine.[144]

Again the federal government appealed. This time the Tenth Circuit vacated the judgment below on the grounds that the case was not ripe for review.[145] The court of appeals held that the district court erred in granting a declaratory judgment that the Wilderness Act created federal reserved water rights.[146] The Sierra Club had not established actual or imminent harm to any wilderness areas from the agency's failure to claim water rights, and consequently, the Club's claim for judicial review was "speculative and contingent."[147]

The appellate court did confirm that the Wilderness Act imposes on federal agencies an affirmative duty to administer wilderness areas so as to "preserve [their] wilderness character."[148] If the Forest Service had permitted strip mining, road construction, or other activities directly inconsistent with the Wilderness Act, the court said, it could review that action.[149] Otherwise, except in those circumstances where an agency's action cannot be reconciled with the Act's mandate to preserve the character of a wilderness area, an agency's decision to use or not to use federal reserved water rights, allegedly created by the Wilderness Act, is committed to agency discretion by law.[150]

The Congressional Research Service prepared a detailed analysis of the Tenth Circuit's opinion.[151] Its report pointed out that the court of appeals had overlooked the fact that the United States was at the time joined in Colorado water proceedings, which the Supreme Court has found to be appropriate for the adjudication of federal reserved water rights.[152] These proceedings determine the legal rights and priorities of all persons, including the United States, along various water courses. The Supreme Court has held that the judgments resulting from these proceedings are final and binding on the United States.[153] Thus, the failure of the Forest Service to claim federal reserved water rights in the adjudication could result in the impairment or even permanent loss of water rights. The CRS report stated, "[Q]uite arguably, agency officials would have a duty to claim federal rights in general water adjudications when

144. *See id.* at 1494.

145. *See* Sierra Club v. Yeutter, 911 F.2d 1405, 1419 (10th Cir. 1990).

146. *See Yeutter*, 911 F.2d at 1421.

147. *Id.*

148. *Id.* at 1413 (quoting Wilderness Act § 4(b), 16 U.S.C. § 1133(b) (1994)).

149. *See id.*

150. *See id.* at 1414.

151. *See* P. Baldwin, Memorandum from American Law Division on Analysis and Implications of *Sierra Club v. Yeutter* on Wilderness Water Rights, Cong. Research Serv. 1 (Feb. 13, 1991) (on file with author).

152. *See id.*

153. *See id.*

failing to do so would be the equivalent of disposing of the property interests of the United States."[154]

The response to the *Sierra Club* litigation was swift. The Solicitor of the Department of the Interior prepared an Opinion repudiating the whole concept of a wilderness water right.[155] On Capitol Hill, Senator Armstrong of Colorado introduced an amendment to a Colorado wilderness bill that expressly renounced any *Winters* water right claim, not only for the areas that the bill would designate, but for areas designated by previous acts, dating back to 1964.[156] When environmentalists opposed the amendment, Senator Armstrong withdrew his support for the bill as a whole, and it died.[157] The Senator's actions set the tone for congressional debate over water and wilderness for the next several years.

V. THE SOLICITOR'S OPINION OF 1988

In an Opinion, dated July 26, 1988, the Solicitor of the Interior Department decided, "[o]n the basis of a detailed examination of the Wilderness Act and its legislative history," that Congress did not intend to reserve water rights when it provided for the designation of wilderness areas.[158] This Opinion superseded the 1979 Opinion. It also represented a reversal of the position taken by the federal government in *Sierra Club v. Lyng*[159] that section 4(d)(6) of the Wilderness Act reflected Congress's intent to be "neutral" on the issue of federal reserved water rights and state water law.[160] The Solicitor concluded that wilderness is not a primary reservation;[161] wilderness designation simply imposes certain management restrictions on existing federal reservations.[162] The Solicitor determined that Congress meant wilderness purposes to be secondary to the purposes of the underlying reservations from which wilderness areas are created.[163]

The Solicitor interpreted section 4(d)(6) of the Wilderness Act (which the Opinion refers to as section 4(d)(7))[164] as specifically dis-

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154. *Id.* For a thorough discussion of the issue of agency discretion not to claim water rights, see Marks, *supra* note 129, at 655–59.

155. *See* 1988 Solicitor's Opinion, *supra* note 3, at 213.

156. *See* Weis, *supra* note 4, at 145–46. Section 7 of this proposal stated:

> No provisions of this Act nor any other Act of Congress designating areas in Colorado as part of the National Wilderness Preservation System, nor any guidelines, rules, or regulations issued thereunder, shall constitute the establishment of a right to the use or flow of water in the Federal Government because of the designation . . . .

S. 2916, 98th Cong. § 7 (1984).

157. *See* Weis, *supra* note 4, at 145–46.

158. 1988 Solicitor's Opinion, *supra* note 3, at 213.

159. 661 F. Supp. 1490 (D. Colo. 1987).

160. *See Lyng*, 661 F. Supp. at 1493.

161. *See* 1988 Solicitor's Opinion, *supra* note 3, at 218.

162. *See id.* at 224.

163. *See id.* at 234–36.

164. *See supra* note 76 (explaining the numbering of sections).

claiming the creation of new water rights, while preserving existing federal reserved water rights for Native American reservations, national forests, and national parks.[165] According to the Solicitor, the "no express or implied claim" language of section 4(d)(6) was meant to "alleviate the concerns of western states" following the *Pelton Dam* decision holding that the Wilderness Act would provide the basis for the assertion of additional federal reserved water rights.[166] In support of his analysis, the Solicitor referred to various portions of the legislative history, particularly the testimony of the California State Water Resources Department and the statement of Senator Hubert Humphrey, discussed previously.[167]

The Solicitor stressed that while section 4(d)(6) disclaimed the creation of any new or additional reserved water rights, it retained existing federal reserved water rights.[168] Congress added the "no denial" clause to the statutory provision "to safeguard federal reserved water rights then existing for park, forest and [Native American] purposes."[169] The "no denial" language, said the Solicitor, recognized that wilderness preservation is one part of the programs carried out in national parks, national forests and Native American reservations, on which federal reserved rights already exist.[170]

To confirm his reading of section 4(d)(6), the Solicitor referred to the State of California's proposal to disclaim in the Wilderness Act all federal exemptions from state law. Senate bill S. 1176 included California's recommended language in 1957, but subsequently modified the language by the addition of the "no denial" phrase.[171] Since there is little Wilderness Act legislative history to explain the reasons the phrase was added, the Solicitor looked to parallel legislative history of the same language used in a bill to overturn the *Pelton Dam* case.[172] This bill was heard by the Senate Committee on Interior and Insular Affairs, the same committee that would begin to consider wilderness bills two years later.[173] California had suggested the following provision be included in the bill to overturn the *Pelton Dam* decision:

> Subject to existing rights under State law, all navigable and nonnavigable waters are hereby reserved for appropriation and use of the public pursuant to State law, and rights to the use of such waters for beneficial purposes shall be acquired under State laws relating to the appropriation, control, use and distribution of such waters.[174]

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165. *See* 1988 Solicitor's Opinion, *supra* note 3, at 219, 223–24.
166. *Id.* at 219, 222.
167. *See supra* text accompanying notes 77–85.
168. *See* 1988 Solicitor's Opinion, *supra* note 3, at 223.
169. *Id.* at 224.
170. *See id.*
171. *See id.*
172. *See id.* at 224–25.
173. *See id.* at 220.
174. *Id.* at 225 (quoting The Water Rights Settlement Act, S. 863, 84th Cong. § 6 (1956)).

The Assistant Attorney General for the Office of Legal Counsel criticized this language as being overbroad and exposing the United States to the potential loss of vested water rights on federal lands.[175] The Solicitor stated that it was the "fear" of losing federal reserved water rights that prompted the Committee to substitute the "no claim or denial" language for California's "subject to existing rights" limitation, not the desire to extend the reserved rights doctrine to wilderness.[176] The Solicitor asserted that "[o]nly if this interpretation of section 4(d)(7) is accepted . . . do subsequent descriptions of 4(d)(7) as a 'disclaimer of any interference with *State* or *Federal* water rights' make sense."[177]

As noted above, the Solicitor also insisted that Congress did not specify preservation of wilderness as the primary purpose of the federal lands in which wilderness areas are designated. The Solicitor relied on the Supreme Court's decision in *United States v. New Mexico*, which distinguished between primary and secondary purposes of national forests in determining the extent of federal reserved water rights created by the reservations.[178] Section 4(a) of the Wilderness Act, he said, "assigns wilderness purposes a secondary role to other purposes for which the lands are administered."[179] The section states, "The purposes of this chapter are hereby declared to be within and supplemental to the purposes for which national forests and units of the national park and national wildlife refuge systems are established and administered. . . ."[180] In addition, the Wilderness Act specifies that it is not meant to interfere with the purposes for which national forests are established or to lower the standards for the use and preservation of the National Park System units.[181] As a consequence of these provisions, and in accord with the Supreme Court's decision in *New Mexico*, the Solicitor concluded "there is no implication that water has been reserved for these secondary uses."[182]

The Solicitor spent appreciable time in his Opinion refuting the three principal arguments against his conclusion that section 4(d)(6) disclaims federal water rights.[183] These arguments are that (1) the language preserves the status quo of the relationship between federal and state water rights; (2) the provision represents a congressional compromise on the construction of water projects in wilderness areas; and (3) the use of

175. *See id.*

176. *See id.*

177. *Id.* at 225–26 (quoting the legislative hearings associated with S.174).

178. *See* United States v. New Mexico, 438 U.S. 696, 702 (1978); *see also supra* notes 111–14 and accompanying text.

179. 1988 Solicitor's Opinion, *supra* note 3, at 235.

180. Wilderness Act § 4(a), 16 U.S.C. § 1133(a) (1994).

181. *See* Wilderness Act § 4(a)(1), (3), 16 U.S.C. § 1133(a)(1), (3); *see also* 1988 Solicitor's Opinion, *supra* note 3, at 236.

182. 1988 Solicitor's Opinion, *supra* note 3, at 236.

183. *See id.* at 227–34.

the same "no claim or denial" language in the Wild and Scenic Rivers Act proves that Congress did not mean to deprive wilderness of reserved water rights.[184]

According to the Solicitor, the theory that section 4(d)(6) maintains congressional neutrality concerning the doctrine of federal reserved water rights, doing nothing more than preserving the status quo, would render the provision essentially meaningless, violating the principle of statutory construction that legislative provisions are not to be interpreted as surplusage.[185] The Solicitor disputed that Congress would have added the "no denial" language simply to negate the "no express or implied claim" language.[186] Rather, Congress added the "no denial" phrase to prevent misinterpretation of the "no claim" language.[187] Furthermore, at the time the language was drafted, Congress was considering legislation to overturn the *Pelton Dam* case.[188] As a consequence, said the Solicitor, it is unlikely that Congress wanted to maintain a status quo that included expanded federal reserved water rights.[189]

The Solicitor found the second argument, that section 4(d)(6) represents an agreement that Congress would negate the guarantee of state water rights in exchange for protection of access for water projects, unsupported by the legislative history of the Wilderness Act, and inconsistent with the subsequent course of the wilderness bills.[190] According to the Solicitor, if such a compromise had been reached, the proponents of water rights would have ceased opposing the bill and those not party to the compromise would have opposed the "sacrifice" of their guaranteed water rights.[191]

On the third argument, that the language used in 4(d)(6) is exactly the same as in the Wild and Scenic Rivers Act, which does reserve water rights, the Solicitor had two responses. The first was that Congress may use the same language to mean different things in different statutes, and the views of a subsequent Congress afford no basis for inferring the purposes of an earlier Congress.[192] His more substantive response was that, although the "wording employed in the Wild and Scenic Rivers Act and the Wilderness Act is the same, the statutory context and stated legislative purpose are in sharp contrast."[193] The "claim or denial" language appears in the Wild and Scenic Rivers Act in a subsection entitled

184. *Cf. id.*
185. *See id.* at 227.
186. *See id.* at 228.
187. *See id.*
188. *See id.*
189. *See id.*
190. *See id.* at 230–32.
191. *Id.* at 231.
192. *See id.* at 232.
193. *Id.*

"Compensation for Water Rights."[194] The purpose of this section, according to the Solicitor, is to ensure that vested water rights are not taken without compensation.[195] Based on the legislative history of the Wild and Scenic Rivers Act, the Solicitor determined that Congress added the "no claim or denial" language "to prevent the reserved water rights created in the Act from eliminating existing rights under state laws that were being taken and which formed the basis for compensation."[196]

VI. THE AFTERMATH OF THE SOLICITOR'S OPINION

Many of the responses to the Solicitor's interpretation of the Wilderness Act have already been considered in the review of the *Sierra Club v. Block* and *Sierra Club v. Lyng* decisions, and in the CRS analysis of the Opinion. As noted, the Solicitor's Opinion conflicted with the court's conclusions on the application of the reserved rights doctrine, whether wilderness is a primary reservation of lands, and the meaning of section 4(d)(6). It also conflicted with the CRS's evaluation of the Wilderness Act's legislative history, and the use of identical language in the National Wildlife Refuge Act and the Wild and Scenic Rivers Act. Finally, it conflicted with ninety years of judicial interpretation of the *Winters* Doctrine.

Although the Opinion was withdrawn in 1994, its issuance in 1988 had an immediate impact on the management of wilderness by federal agencies, and on the wilderness debate in Congress. Two days after the Opinion was released, then Attorney General Meese advised Secretary of the Interior Hodel that he agreed that the Opinion "properly finds that no legally sufficient basis exists for an implication of federal reserved water rights for wilderness purposes."[197] Attorney General Meese directed federal agencies not to claim federal reserved water rights for wilderness in pending general stream adjudications, but to seek water for wilderness purposes, where appropriate, under state law.[198]

After Attorney General Meese left office, the Sierra Club Legal Defense Fund (SCLDF), on behalf of the Sierra Club and The Wilderness Society, requested Attorney General Thornburgh to reconsider the Meese decision.[199] The general stream adjudication for the Virgin River in Utah

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194. 16 U.S.C. § 1284(b) (1994).

195. *See* 1988 Solicitor's Opinion, *supra* note 3, at 232–33.

196. *Id.* at 233.

197. Letter from Edwin Meese, Attorney General of the United States, to the Honorable Donald P. Hodel 1 (July 28, 1988)) (on file with author).

198. *See id.* Attorney General Meese stated: "Accordingly, in the absence of express statutory language, we will not assert reserved wilderness water rights under federal law in any further litigation on behalf of the United States, but will seek water for wilderness purposes where appropriate under states law." *Id.*

199. *See* Letter from Laurens Silver, Esq., Sierra Club Legal Defense Fund, to the Honorable Richard Thornburgh, Attorney General of the United States 2 (Sept. 8, 1988) [hereinafter Silver Letter] (on file with author).

was pending at the time and the United States was faced with a deadline for claiming water rights for the Beaver Dam Mountains Wilderness,[200] which Congress designated in the Arizona Wilderness Act of 1984.[201] SCLDF expressed concern that the failure of the United States to assert water rights for the wilderness would result in the loss of these rights in the adjudication process.[202] Since the Beaver Dam Wilderness Area was a mid-stream and not a headwaters wilderness, the failure of the United States to claim water rights might have resulted in a lack of water for the entire area if upstream appropriation occurred.[203]

Attorney General Thornburgh did not reverse Attorney General Meese's position concerning the duty of federal agencies to claim water rights for wilderness in state proceedings, and it continued to be the policy of the United States for the next five years.[204] No water rights were asserted for the Beaver Dam Wilderness in the adjudication of the Virgin River.[205]

The Solicitor's Opinion presented the environmental community with a significant dilemma: whether to insist that the Opinion was incorrect and that the *Winters* Doctrine assured water rights for wilderness, or to push for the express reservation of water rights in wilderness bills under consideration by the Congress. Both choices were risky. Silence in a wilderness bill carried the risk that areas designated would be determined subsequently to have no water rights. An express reservation of water rights carried the risk that any wilderness legislation without water rights language would be read as disclaiming water rights for the areas established. Since a significant portion of the National Wilderness Preservation System was created by the Wilderness Act of 1964 and other legislation without express water rights language, the consequences of the first choice initially appeared to be greater than those that might follow an express reservation.[206]

Members of the 100th Congress tried a number of approaches to water rights language, some with greater success than others. For example, after Senator Armstrong's bill died, Senator Timothy Wirth and Congressman Michael Strang attempted to develop a wilderness bill for

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200. *See id.*

201. Pub. L. No. 98-406, 98 Stat. 1485, 1492.

202. *See* Silver Letter, *supra* note 199, at 3.

203. *Cf. id.*

204. The Federal Register notice announcing the withdrawal of the 1988 Solicitor's Opinion stated that the Attorney General's concurrence in it was withdrawn as well. *See* Water Rights Under the Wilderness Act, 59 Fed. Reg. 19,692, 19,692 (1994).

205. *See* Interview with K. Jack Haugrud, Assistant Chief, General Legislation Section, Environment and Natural Resources Division, United States Department of Justice (Oct. 13, 1998) [hereinafter Haugrud Interview].

206. *See* Letter from Representatives of The Wilderness Society, the Sierra Club, and the National Wildlife Federation to Jim Martin, State Director, Office of Sen. Timothy Wirth of Colorado 1-3 (Jan. 29, 1991) [hereinafter Wilderness Society Letter] (on file with author).

Colorado, using two different strategies for water rights.[207] Senator Wirth's bill was silent as to federal reserved water rights; Congressman Strang's bill directed the Secretary of the Interior to claim minimum instream flows for wilderness areas, pursuant to Colorado law, which permits instream appropriations to "preserve the natural environment to a reasonable degree."[208] However, "Congressman Strang's bill did not use the language of the Colorado instream statute, but instead [proposed to limit] federal water appropriations to the minimum amount necessary to preserve 'aquatic life to a reasonable degree.'"[209] The bill also prohibited federal water appropriations during "drought events."[210] Environmentalists opposed both the Wirth and the Strang bills as offering insufficient protection for wilderness qualities and stream flows.[211] No wilderness legislation was enacted for Colorado until 1993.[212]

The fight over water rights for wilderness convinced the environmental community that silence was no longer golden. Environmental groups like the Sierra Club and The Wilderness Society worked to persuade members of Congress of the need to expressly preserve water rights in legislation creating federal reservations. Water language became as big a battleground as acreage and areas, not just for wilderness, but for national reserves, monuments, national conservation areas, and other federal land designations. Although the adopted language varied, no bill claimed that wilderness was not a reservation or stated that wilderness had no rights to water. The bills that did deny federal reserved water rights indicated that the use of such rights was not necessary to protect the wilderness qualities of the designated areas.[213]

For example, Congress denied the reservation of water rights in the legislation creating the Hagerman Fossil Beds National Monument and the City of Rocks National Reserve, but tied the denial to the "unique circumstances with respect to the water" found in these areas.[214] Specifically, Congress determined that there were no resources in the areas requiring the protection of a federal reserved water right. The legislative language for the Hagerman Fossil Beds Monument reads:

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207. *See* Leshy, *supra* note 73, at 413–14 nn.93–97; Weis, *supra* note 4, at 146–48.

208. Weis, *supra* note 4, at 147 (quoting COLO. REV. STAT. § 37-92-103(4) (1973)).

209. *Id.* (quoting H.R. 4233, 99th Cong. § 2 (1986)).

210. *Id.*

211. *See id.* at 146–47.

212. *Cf.* Colorado Wilderness Act of 1993, Pub. L. No. 103-77, 107 Stat. 756.

213. The Congressional Research Service and Debbie Sease, Legislative Director of the Sierra Club, documented the water rights formulations used in the 100th Congress. *See* Pamela Baldwin, *Express Language on Federal Water Rights in the 100th Congress*, Cong. Research Serv. 1, 1 (Feb. 7, 1989) [hereinafter Baldwin, *Express Language*]; Memorandum from Debbie Sease, Legislative Director, Sierra Club, to Water List on Water Rights Language (Jan. 26, 1989) (on file with author) (discussing the legislative language on water rights existing at the time).

214. Arizona-Idaho Conservation Act of 1988, Pub. L. No. 100-696, §§ 202(f), 304, 102 Stat. 4571, 4575–76; *see* Baldwin, *Express Language*, *supra* note 213, at 8.

> Congress finds that there are unique circumstances with respect to the water or water-related resources within the Monument designated by this title. The Congress recognizes that there is little or no water or water-related resources that require the protection of a federal reserve water right. Nothing in this title, nor any action taken pursuant thereto, shall constitute either an expressed or implied reservation of water or water right for any purpose.[215]

Congress seemed most comfortable with an express reservation of some, but not all of the unappropriated water available in the areas designated. Section 502 of the Washington Park Wilderness Act of 1988, for example, stated "[s]ubject to valid existing rights, within the areas designated as wilderness by this Act, Congress hereby expressly reserves such water rights as necessary, for the purposes for which such areas are so designated."[216] This language modified the original language of S. 2165, which called for the reservation of all the unappropriated water in the water sources within the wilderness areas established.[217]

In section 509 of the El Malpais National Monument, New Mexico—Establishment bill,[218] Congress limited the amount of water rights reserved to the "minimum" necessary to carry out the reservations' purposes, protected valid existing rights, and declared that it did not intend to set a precedent for future designations or to affect the interpretation of any other statute:

> (a) Congress expressly reserves to the United States the minimum amount of water required to carry out the purposes for which the national monument, the conservation area, and the wilderness areas are designated under this Act. . . .
>
> (b) Nothing in this section shall affect any existing valid or vested water right, or applications for water rights which are pending as of the date of enactment of this Act and which are subsequently granted . . . .
>
> (c) Nothing in this section shall be construed as establishing a precedent with regard to any future designations, nor shall it affect the interpretation of any other Act or any designation made pursuant thereto.[219]

The environmental community regarded the El Malpais language as a reasonably good approach.[220] The express reservation of water rights as-

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215. Arizona-Idaho Conservation Act § 304, 102 Stat. at 4576. The City of Rocks National Reserve used the same approach, and virtually the same language. *See id.* § 202(f), 102 Stat. at 4575; *see also* Baldwin, *Express Language*, *supra* note 213, at 8–9.

216. Washington Park Wilderness Act of 1988, Pub. L. No. 100-668, § 502, 102 Stat. 3961, 3968.

217. *See* Baldwin, *Express Language*, *supra* note 213, at 4.

218. Pub. L. No. 100-225, § 509, 101 Stat. 1539, 1549 (1987).

219. *Id.* § 509(a)–(c), 101 Stat. at 1549.

220. *See* Leshy, *supra* note 73, at 415–17. Leshy disagreed with this assessment, calling the El Malpais language "not a terrible result, . . . [but] . . . far from ideal." *Id.* at 417.

sured that such rights were set aside for the areas subject to the legislation. The statement concerning precedent and interpretation left in place the argument that the *Winters* Doctrine applied to all wilderness legislation containing no express reservation of water. The drawbacks to the El Malpais formula were that only a minimum amount of water was reserved and protection was extended to pending applications for water rights, as well as vested rights, considerably expanding the category of rights with priority over those of the federal reservations.[221]

A number of wilderness bills not only reserved water rights but directed the Secretary of the appropriate federal agency to file claims for their quantification in an appropriate stream adjudication. This congressional instruction conflicted with Attorney General Meese's order to the federal agencies not to claim federal reserved water rights in stream adjudications.

The Nevada Wilderness Protection Act of 1989,[222] for example, reserved "a quantity of water sufficient to fulfill the purposes of the wilderness areas created by this Act"[223] and commanded the Secretary to "file a claim for the quantification of the water rights reserved . . . in an appropriate stream adjudication."[224] The United States subsequently filed claims for all the unappropriated water flows in the wilderness areas created by the Act.[225]

By 1991, the environmental community had decided it was time to draft "model" water rights language in order to avoid the further proliferation of water rights provisions in wilderness bills.[226] The community had the help of some of the premier water lawyers in the country, including Charles ("Barney") White, Lori Potter, and David Getches.[227] The three basic concepts in the model language were: (1) an express reservation of, if not full flows, at least sufficient water to fulfill all the purposes of the reservation; (2) a statement of congressional intent either not to deny the existence of *Winters* Doctrine water rights for lands designated in other legislation or not to imply any interpretation about prior or future wilderness bills, and (3) a directive to federal agencies to take steps to protect water rights in appropriate state adjudication.[228]

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221. *See id.* at 416.

222. Pub. L. No. 101-195, 103 Stat. 1784.

223. *Id.* § 8(a), 103 Stat. at 1788.

224. *Id.* § 8(c), 103 Stat. at 1788.

225. *See* Haugrud Interview, *supra* note 205.

226. *See* Sease & Green Memorandum, *supra* note 8; Wilderness Society Letter, *supra* note 206, at 3.

227. *Cf.* Wilderness Society Letter, *supra* note 206, at 3–4.

228. *Cf.* Sease & Green Memorandum, *supra* note 8, at 2; Wilderness Society Letter, *supra* note 206, at 3.

The language used in the Arizona Wilderness Act of 1990[229] came very close to the model, and was supported by the environmental community for use in a number of state bills, including Montana, California, Colorado, and Utah.[230] The Act's language reads:

> WATER—(1) With respect to each wilderness area designated by this title, Congress hereby reserves a quantity of water sufficient to fulfill the purposes of this title. The priority date of such reserved rights shall be the date of enactment of this Act.
>
> (2) The Secretary and all other officers of the United States shall take steps necessary to protect the rights reserved by paragraph (1), including the filing by the Secretary of a claim for the quantification of such rights in any present or future appropriate stream adjudication in the courts of the State of Arizona in which the United States is or may be joined and which is conducted in accordance with the McCarran Amendment (43 U.S.C. § 666).
>
> (3) Nothing in this title shall be construed as a relinquishment or reduction of any water rights reserved or appropriated by the United States in the State of Arizona on or before the date of enactment of this Act.
>
> (4) The Federal water rights reserved by this title are specific to the wilderness areas located in the State of Arizona designated by this title. Nothing in this title related to reserved Federal water rights shall be construed as establishing a precedent with regard to any future designations, nor shall it constitute an interpretation of any other Act or any designation made pursuant thereto.[231]

After the furor of 1987–1991, the controversy over wilderness and water rights died away. The Colorado Wilderness Act of 1993[232] was the last major legislative fight. The water rights formulation included in this Act is unlike any other. The Act does not deny the existence of federal reserved water rights for wilderness, but expressly disclaimed the need to use them to protect the wilderness qualities of the areas which it designated.[233] Congress found that the lands delineated by the Act are principally headwaters, with few, if any, upstream "water resource facilities,"[234] and few, if any, opportunities for diversion, storage or other uses of water that would adversely affect wilderness values.[235] Congress also found

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229. Pub. L. No. 101-628, 104 Stat. 4469.

230. *Cf.* Wilderness Society Letter, *supra* note 206, at 3.

231. Arizona Desert Wilderness Act § 101(g), 104 Stat. at 4473–74.

232. Pub. L. No. 103-77, 107 Stat. 756.

233. *See* Colorado Wilderness Act § 8(b)(2)(A), 107 Stat. at 762.

234. Section 8(a)(3) of the Colorado Wilderness Act defines "water resource facility" to mean "irrigation and pumping facilities, reservoirs, water conservation works, aqueducts, canals, ditches, pipelines, wells, hydropower projects, and transmission and other ancillary facilities, and other water diversion, storage, and carriage structures." *Id.* § 8(a)(3).

235. *See id.* § 8(a)(1)(A).

that the lands reserved for wilderness by the Act are not suitable for development or expansion of water resource facilities.[236] For these reasons, Congress determined that "it is possible to provide for proper management and protection of the wilderness value of such lands in ways different from those utilized in other legislation designating [wilderness areas]."[237] Accordingly, the Act protects the wilderness qualities and values of the areas designated "by means other than those based on a Federal reserved water right."[238]

To underscore its intention to rely on mechanisms other than federal reserved water rights to protect wilderness qualities, Congress prohibited any federal official, agency or court from asserting or considering any claim for water or water rights in the State of Colorado "which is based on any construction of any portion of this Act, or the designation of any lands as wilderness by this Act."[239]

Congress attempted to limit the precedential effect of these unusual water rights provisions by declaring that nothing in the Colorado Wilderness Act "shall be construed as a creation, recognition, disclaimer, relinquishment, or reduction" of preexisting federal water rights,[240] or an interpretation of any other legislative act or designation, except as related to the water rights created by the Platte River Wilderness Act.[241] Furthermore, Congress stated that "[n]othing in the section shall be construed as establishing a precedent with regard to any future wilderness designations."[242]

The remainder of the water rights-related provisions in the Colorado Wilderness Act concern development of access to water resources facilities, and the effect of the Act on the Interstate Compact for the North Platte River.[243] The President and other federal officials are prohibited from funding, assisting or approving the development of new water resource facilities in wilderness areas designated by the Act, but existing facilities and access are grandfathered.[244] The Act has no effect on the North Platte River Interstate Compact or equitable apportionment decrees that apportion water among Colorado and other states.[245]

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236. *See id.* § 8(a)(1)(B).
237. *Id.* § 8(a)(1)(C).
238. *Id.* § 8(a)(1)(2).
239. *Id.* § 8(b)(1).
240. *Id.* § 8(b)(2)(B).
241. *See id.* § 8(g).
242. *Id.* § 8(b)(2)(D).
243. *Cf. id.* § 8(c)–(g) (allowing the Secretary to permit reasonable access to water resource facilities already in existence).
244. *See id.* § 8(c)–(e).
245. *See id.* § 8(g).

VII. STATUS OF THE ISSUE TODAY

A. *General Stream Adjudication*

Although the congressional controversy over wilderness water rights dissipated following the passage of the Colorado Wilderness Act, the substantive question of whether wilderness has implied federal reserved water rights remains. In 1993, the United States again faced a deadline for filing claims for federal reserved water rights for wilderness areas, this time in the Snake River Basin Adjudication.[246] At issue were three significant wilderness areas: the Frank Church-River of No Return, the Selway-Bitterroot and the Gospel-Hump.[247] The legislation creating these wilderness areas was silent concerning water rights.[248]

A new Administration had come to Washington, D.C., with a new perspective on federal reserved water rights for wilderness. On December 8, 1993, Attorney General Janet Reno notified Secretary of the Interior Babbitt of the Justice Department's intent to reexamine the policy expressed in the 1988 Solicitor's Opinion.[249] Pending completion of this review by the Justice Department's Office of Legal Counsel, Attorney General Reno suspended Attorney General Meese's directive to federal agencies not to claim federal reserved water rights for wilderness areas in stream adjudications.[250]

On December 28, 1993, the Departments of the Interior and Agriculture, in consultation with the Department of Justice, sought public comment on the reevaluation of the position taken by the Solicitor in his 1988 Opinion.[251] The Solicitor's Opinion was suspended pending receipt of comment.[252] Subsequently, the Departments of the Interior and Agriculture withdrew the Solicitor's Opinion, as well as Attorney General Meese's concurrence with it, in a Federal Register notice extending the comment period.[253] No replacement opinion has yet been issued. Withdrawal of the Attorney General's directive permitted the United States to file claims for water rights for the three wilderness areas involved in the

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246. *See* Haugrud Interview, *supra* note 205; *see also In re* Snake River Basin Adjudication, Case No. 39576 (Dist. Ct. Idaho Dec. 18, 1997) (order granting and denying United States' motions for summary judgment on reserved water rights claims).

247. *See* Haugrud Interview, *supra* note 205.

248. The Selway-Bitterroot Wilderness was created by the Wilderness Act of 1964; the Frank Church-River of No Return Wilderness by the Central Idaho Wilderness Act of 1980, Pub. L. No. 96-312, 94 Stat. 948, and Act of March 14, 1984, Pub. L. No. 98-231, 98 Stat. 60 (codified at 16 U.S.C. § 1132 note); and the Gospel-Hump Wilderness by the Endangered American Wilderness Act of 1978, Pub. L. No. 95-237, 92 Stat. 46 (codified at 16 U.S.C. § 1132 note).

249. *See* Letter from Attorney General Janet Reno to Secretary of the Interior Bruce Babbitt (Dec. 8, 1993) (on file with author).

250. *See id.*

251. *Cf.* Water Rights Under the Wilderness Act, 58 Fed. Reg. 68,629, 68,629 (1993).

252. *See id.*

253. *See* Water Rights Under the Wilderness Act, 59 Fed. Reg. 19,692, 19,692 (1994).

Snake River Basin Adjudication. These claims were based on the *Winters* Doctrine.[254]

On December 18, 1997, Judge Daniel Hurlbutt, Jr., the judge presiding over the adjudication, granted the United States' motion for summary judgment on the legal issue of whether the United States was entitled to claim reserved water rights under the Acts creating the wilderness areas.[255] The Judge concluded that the United States was entitled to a federal reserved water right for all the unappropriated flows in the three wilderness areas.[256] He found, as a matter of law, that "the entire amount of unappropriated water constituting the natural flow in each designated wilderness area is the amount necessary to fulfill Congress's intent to preserve and protect the wilderness areas for which claims have been filed in the [Snake River Basin Adjudication]."[257]

The judge discounted the assertion of the objectors that wilderness is a secondary purpose, supplemental to the overriding purposes of the land system from which the wilderness is created.[258] He stated,

> Under the Wilderness Act, Congress intended to create a new category of land in which wilderness purposes would be primary and above all other purposes previously allowed in national forests. These wilderness purposes would then be permanently protected by legislative, not executive action.[259]

The Judge also considered the meaning of the "no claim or denial" language in section 4(d)(6) of the Wilderness Act.[260] He determined that Congress included the language to maintain the status quo in the law governing United States water rights.[261] As support for this finding, the Judge relied on the Wilderness Act's legislative history, in particular the explanations offered by Senator Humphrey,[262] and the fact that statutes like the Wild and Scenic Rivers Act subsequently used the same language.[263] In short, the Judge evaluated the application of the *Winters* Doctrine to wilderness areas in the same manner as the court in *Sierra*

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254. *See* Haugrud Interview, *supra* note 205.

255. *See In re* Snake River Basin Adjudication, Case No. 39576, at 2–3 (Dist. Ct. Idaho Dec. 18, 1997) (order granting and denying United States' motions for summary judgment on reserved water rights claims).

256. *See Snake River Basin Adjudication*, Case No. 39576, at 16.

257. *Id.*

258. *See id.* at 8–9.

259. *Id.* at 7.

260. *See id.* at 11–12.

261. *See id.* at 12.

262. *See id.*

263. *See id.* at 12–13 The Judge quoted Senator Church's comments on the meaning of the "no claim or denial" language in the Wild and Scenic Rivers Act. *See id.* The Senator stated that "[t]he whole purpose of the language in the sections to which the Senator has referred . . . was to maintain the status quo with respect to the whole complicated structure of water law." 112 CONG. REC. 431 (1966).

Club v. Block, and reached the same conclusion. Not surprisingly, the objectors have appealed Judge Hurlbutt's decision to the Supreme Court of Idaho.[264]

B. *On Capitol Hill*

On Capitol Hill, things are relatively quiet where water rights are concerned. Only a few wilderness areas have been designated since 1993.[265] The quiet belies congressional resolution of the issue. A significant conflict over wilderness in Utah has been brewing for the past several years. The Southern Utah Wilderness Alliance (SUWA) blocked wilderness bills proposed by the Utah delegation in the 104th Congress, in part because the bills expressly disavowed water rights for the areas to be designated.[266] SUWA and other groups also opposed a bill for the San Rafael region of Utah in part because it disclaimed water rights for the area.[267] This bill was defeated in October of 1998.

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264. *See* Idaho Supreme Court Nos. 24545–24548, 24557–24559; *In re* SRBA Case No. 39576, Wilderness Reserved Claims, Consolidated Subcase No. 75-13605; Hells Canyon National Recreation Area Claims, Consolidated Subcase No. 79-13597, Supreme Court of Idaho (1998).

265. The most significant of these designations was made by the California Desert Protection Act, which established a national park, as well as a number of wilderness areas. The water rights language in the Act is similar to that used in the Arizona Desert Wilderness Act of 1990. It reserves a quantity of water sufficient to fulfill the purposes of the Act, with a priority date of the enactment of the statute. The Secretary and other federal officers are directed to "take all steps necessary" to protect the water rights reserved by the Act, including the filing of claims in stream adjudications. Nothing in the Act is to be construed as a relinquishment or reduction of any water rights reserved or appropriated by the United States before the Act was passed. Finally, the California Desert Protection Act is not to be interpreted as creating any precedent for future designations or for any other Act. *See* California Desert Protection Act of 1994, Pub. L. 103-433, § 706, 108 Stat. 4471. Two 1990 statutes creating wilderness in Illinois and Maine are silent on water and water rights. *See* Illinois Wilderness Act of 1990, Pub. L. 101-633, 104 Stat. 4577; Maine Wilderness Act of 1990, Pub. L. 101-401, 104 Stat. 863.

266. *See* H.R. 1745, 104th Cong. § 4(a) (1995); S. 884, 104th Cong. § 4(a) (1995). Section 4 of these bills stated that "[n]othing in this Act or any other Act of Congress shall constitute or be construed to constitute either an express or implied Federal reservation of water or water rights for any purpose arising from the designation of areas as wilderness by this Act." *Id.* The bill further provided that the United States "may acquire and exercise such water rights as it deems necessary" pursuant to Utah State law. S. 884 § 4(b).

267. *See* S. 2385, 105th Cong. § 304(a)–(b) (1998). Section 304 states:

> (a) Congress finds that—
>
> (1) The San Rafael Swell region of Utah has a high desert climate with little annual precipitation and scarce water resources;
>
> (2) in order to preserve the limited amount of water available to wildlife, the State of Utah has granted to the Division of Wildlife Resources an instream flow right in the San Rafael River; and
>
> (3) this preserved right will guarantee that wetland and riparian habitats within the San Rafael region will be protected for designations such as wilderness, semi-primitive areas, bighorn sheep areas, and other Federal land needs within the San Rafael Swell region.
>
> (b) No Federal Reservation—Nothing in this Act or any other Act of Congress constitutes an express or implied Federal Reservation of water or water rights for any purpose arising from the designation of any area as part of the Conservation Area or as a wilderness or semi-primitive area under this Act.

Id.

Prospects seemed good for H.R. 1500 during the fall of 1998, but the congressional session ended without its enactment. The bill expressly reserved a "quantity of water sufficient to fulfill the purposes of this Act."[268] It also directed the Secretary of the Interior and all other officers of the United States to:

> [T]ake all steps necessary to protect the rights reserved . . . including the filing by the Secretary of a claim for the quantification of such rights in any present or future appropriate stream adjudication in the courts of the State of Utah in which the United States is or may be joined and which is conducted in accordance with . . . the McCarran Act.[269]

H.R. 1500 will be reintroduced in the spring of 1999 under a different number, but the environmental community is not optimistic about passage of this, or any other Utah wilderness bill during this Congress.

BLM lands remain on the wilderness designation agenda. Only two of the western states (California and Arizona) have designated BLM wilderness. Thus the issue of water rights for wilderness will have to be addressed for all of the others. BLM lands are often downstream. Although rights for newly created BLM wilderness areas would be very junior in priority, this will not prevent debate over the effect of federal water rights on upstream users.

VII. CONCLUSION: IMAGINE WILDERNESS

Some observers may say that there is now little cause for concern about the legal issue of whether the *Winters* Doctrine applies to wilderness. The United States has withdrawn the 1988 Solicitor's Opinion and claimed reserved water rights for wilderness in general stream adjudications. The presiding judge in the Snake River Basin Adjudication strongly agreed with the application of the *Winters* Doctrine to wilderness. The legislation establishing wilderness areas, which was enacted during the late 1980s and early 1990s, recognized the importance of water for wilderness and assured the availability of sufficient water to protect wilderness qualities, even if federal reserved rights were not the chosen vehicle. Congress has made no declaration that wilderness is not a reservation entitled to federal reserved water rights to fulfill its primary purposes.

All of this is correct, but does not mean that the issue is finally resolved. Each time Congress considers a wilderness bill, the question of water rights must be addressed. Each time the United States files claims for wilderness in a general stream adjudication, objectors will oppose recognition of those rights. Whether Congress says nothing or expressly

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268. H.R. 1500, 104th Cong. § 202(a) (1998).
269. *Id.* § 202(a)(2).

reserves water rights, other areas in the System are potentially affected. The same is true whether the United States files or does not file for wilderness water rights in stream adjudications.

Congress could settle this matter, of course, although the maxim about being careful what you wish for because you might get it does come to mind. The easiest way would be to amend the Wilderness Act of 1964 to express Congress's intent that wilderness has rights to all the water flowing in and through it, or at least rights to all the water necessary to fulfill the purposes for which wilderness areas are created. A less naive suggestion is for Congress to develop and use a model water rights provision which includes the elements identified by the environmental community in 1989: an express reservation of all water necessary to fulfill all reservation purposes; direction to the federal agencies to take steps to perfect these rights in appropriate state proceedings; and a statement that wilderness constitutes a reservation with primary purposes, for which water rights are implied when legislation is silent. Such model language does not threaten state law or valid existing rights. It acknowledges that wilderness has water rights, but requires that such rights be quantified in state proceedings. It removes the cloud of uncertainty surrounding wilderness areas designated by legislation silent on water rights.

Professor Janice Weis has noted that "[a] uniform, national water policy for protecting wilderness areas is more desirable than a piecemeal, state-by-state determination of wilderness water rights."[270] She is correct, but only if the agenda of those opposing water rights for wilderness is not to prevent additions to the Wilderness System or to fight restrictions on use of federal lands for non-commodity purposes.

A number of environmentalists and water lawyers have repeatedly pointed out that wilderness rarely conflicts with the appropriation and use of water rights.[271] Wilderness does not consume water, except in its natural processes. Water flows through wilderness areas, undiverted and unsullied, available for downstream appropriation. Most wilderness areas are located at or near the headwaters of streams, so there are few upstream appropriators who must leave water in the stream to fulfill wilderness rights. Further, because wilderness is a relatively new legislative creation, most wilderness areas are junior in priority. They take their place in line and must yield to more senior rights, even in times of shortage and drought.

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270. Weis, *supra* note 4, at 150. For Weis's proposed legislative solution, see *id.* at 148–53.

271. *See* Leshy, *supra* note 73, at 395–98 & n.38 (noting that after the initial decision in *Sierra Club v. Block*, members of the Colorado congressional delegation asked the Colorado Department of Natural Resources to report on the conflicts between wilderness water rights and other uses). The Department concluded that "there is little actual or potential conflict between existing or conditional water rights and any federal reserved rights that may be established in existing or proposed wilderness areas on Colorado National Forests." *Id.* at 398 n.38 (quoting Letter from David Getches and Jeris Danielson to Sen. Gary Hart, Rep. Hank Brown, and Rep. Ken Kramer 3 (Feb. 24, 1986)); *see also* Weis, *supra* note 4, at 142–44; Marks, *supra* note 129, at 651–52 (reviewing the results of the Colorado Department of Natural Resources Report).

About the only potential for conflict between wilderness and water use is when a senior appropriator proposes to change his point of diversion or place and manner of use in a way that affects stream flows through wilderness. Under prior appropriation law, a senior appropriator may not alter any aspect of his water right, including point of diversion, timing, manner or place of water use, if the change will harm a junior appropriator.[272] The United States, like any other junior appropriator, could block a change that would impair water flows in wilderness.[273]

If it is true that wilderness poses little threat to appropriators of water, why is the antagonism to federal reserved water rights for wilderness so pronounced? Why does the environmental community insist on the creation of water *rights*, when the location of most wilderness areas protects their water from appropriation? Is this a real fight, or shadow-boxing?

The answer to the question about the hostility to federal reserved rights brings us back to the early days of the settlement of the West. It speaks to the significance for Westerners of the right to use water in a region characterized by aridity. It reflects the idea that water is not to be "wasted" in a stream, but diverted and applied to economic activity. Wrapped up in the answer, as well, are anti-federal government sentiments, aversion to "tree huggers," and antipathy for outsiders seen as trying to dictate how life should be led.

The answer to the question about the environmental community's insistence on water rights has to do with common sense, ecology, and the future. It is logical to extend the *Winters* Doctrine to wilderness, as the Supreme Court extended it to national parks, national wildlife refuges, national monuments and other reservations of federal lands. It makes no sense to conclude that Congress created a system of lands retaining their "primeval character and influence" and managed "so as to preserve [their] natural conditions"[274] without providing such a system with water. In the future, the National Wilderness Preservation System may be expanded to include mid-stream or downstream areas. It will be important to have agreement on the availability of the water rights needed to support the communities of life within these areas, to assure that they will be full partners in the Wilderness Preservation System.

Finally, to make sense, law that impacts the natural environment must be based on scientifically sound principles. Law may be able to sever water from land for purposes of allocating rights of use. However, it cannot sever land from its need for water, or even lessen the critical role that water plays in sustaining life.

Imagine wilderness without water. Imagine . . .

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272. *See* TARLOCK, *supra* note 15, § 5.17[3][a].

273. *Cf.* Marks, *supra* note 129, at 651–55.

274. Wilderness Act § 2(c), 16 U.S.C. § 1131(c) (1994).